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SUPREME COURT U.S.
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No. 04-170

In the Supreme Court of the United States

MARIE HAHN,

Petitioner,

v.

THE VILLAS AT ST. THERESE ASSISTED LIVING, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Ohio Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

ROGER P. SUGARMAN
Counsel of Record
ROBERT G. SCHULER
PAUL D. RITTER
R. KEVIN KERNS
KEGLER, BROWN, HILL & RITTER
A LEGAL PROFESSIONAL ASSOCIATION
65 E. STATE STREET, SUITE 1800
COLUMBUS, OH 43215
(614) 462-5400

Counsel for Respondents

Becker Gallagher Legal Publishing, Inc.
800.890.5001

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STATUTORY PROVISIONS AT ISSUE

In her Petition for Writ of Certiorari, Petitioner attacks the constitutionality of Ohio Revised Code Section 2505.02, but only cites portions of the statute. The entire statute reads as follows[1]:

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, or suppression of evidence.

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[1] Respondents would note that the version of ORC Section 2505.02 cited in this brief is the version that was in effect at the time of the underlying action in this case. Respondents also note that ORC Section 2505.02 was amended effective September 1, 2004 with changes made to subsections (B)(3) and (D), amended a second time effective September 13, 2004 adding subsection (B)(6), and amended a third time effective September 13, 2004 with changes made to subsection (A)(3).

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the

grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on the effective date of this amendment and all claims filed or actions commenced on or after the effective date of this amendment, notwithstanding any provision of any prior statute or rule of law of this state.

STATEMENT OF THE CASE

A. Background Facts

Respondent The Villas at St. Therese Assisted Living, Inc. ("the Villas")[2] is an Ohio licensed residential care facility managed by the Carmelite Sisters for the Aged and Infirm, an Order of Roman Catholic nuns dedicated to the care of the elderly. *Plaintiff's Verified Complaint*. The Villas employs approximately 33 individuals to provide living assistance to 42 elderly residents. *Id.*

One of the residents who resided at the Villas at the time the underlying action commenced was Monsignor Clement F. Faistl, a 91 year old retired Roman Catholic Priest. *Id.* The Villas provided assistance to Monsignor Faistl in his living needs, including but not limited to assistance with his meals, administration of his various medications, access to various events at the Villas, and physical assistance for daily living. *Id.*

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[2] The Villas, along with Bishop James A Griffin, and the Diocese of Columbus are Respondents in the underlying action, and are jointly referred to herein as "Respondents".

Prior to August 7, 2003, Petitioner Marie Hahn regularly visited Monsignor Faistl, spending large parts of each day with Monsignor Faistl. It was not uncommon for Petitioner to arrive at the Villas as early as 7:00 a.m., and remain at the Villas as late as 10:30 p.m. *Id* The amount of time that Petitioner spent with Monsignor Faistl became a concern to the administrators at the Villas in light of Petitioner's attempts to isolate Monsignor Faistl from other activities and individuals at the Villas. Indeed, as early as August of 2002, Petitioner had made accusations concerning Monsignor Faistl in an attempt to limit his visits by other individuals. *See letters from Petitioner to former administrator at the Villas offered into to evidence during the preliminary injunction hearing and attached as Exhibit A to Respondents' Motion to Dismiss Petitioner's Appeal to the Tenth Appellate District Court.*

On August 7, 2003, a staff member at the Villas witnessed Petitioner being verbally abusive to Monsignor Faistl. *Plaintiff's Verified Complaint*. The administrators at the Villas confronted Petitioner about this incident later that same day. *Id.* Petitioner indicated that she was having problems at home, and that she was under a lot of stress. *Id.* The administrators at the Villas believed the amount of time that Petitioner was spending with Monsignor Faistl was adversely affecting her actions with Monsignor Faistl and causing her to be verbally abusive toward him. During this meeting, the administrators at the Villas asked Petitioner to restrict her hours of visitation to between 8:30 a.m. and 3:30 p.m. *Id.* While Petitioner initially agreed to the limited restrictions as documented in a summary of occurrence which Petitioner signed on August 7, 2003, *Exhibit B to Respondents' Motion to Dismiss Petitioner's Appeal to the Tenth Appellate District Court*, she later complained to the Office of the Long-Term Care Ombudsman, Ohio Department of Aging ("Office of the

Ombudsman") regarding those restrictions. As a result of that complaint, the Office of the Ombudsman sent a representative to investigate the situation. *Testimony of Sister Lois Baniewitz offered during preliminary injunction hearing.* The Ombudsman representative interviewed Monsignor Faistl, Petitioner, staff of the Villas, and administrators at the Villas. On August 22, 2003, the Ombudsman representative told both Petitioner and the administrators at the Villas that Petitioner was not to have any contact with Monsignor Faistl until her investigation was completed. *Id.*

On August 30, 2003, administrators at the Villas received a call from a representative of the Access Transit Company ("Access") who stated that Access had received a call from Petitioner asking that the Company have a van drive to the rear of the Villas on the 30th to pick-up a resident who would be waiting at the back of the Villas. *Plaintiff's Verified Complaint.* Petitioner told the representative of Access to have the van keep its lights off. Petitioner also told Access not to contact the Villas. *Id.*

Because of the unusual nature of the call, the Access representative immediately called the Villas, and ultimately relayed Petitioner's request to an administrator at the Villas. *Id.* The administrator went to see Monsignor Faistl and found him in his room with his suitcase packed. *Id.* The administrator asked why his suitcase was packed and he indicated that he was told to pack his suitcase by Petitioner. *Id.* At that point, the administrator asked Monsignor Faistl if he wanted to leave the Villas and he indicated that he did not. *Id.*

On September 25, 2003, staff of the Villas found Petitioner wearing a wig and hiding in the shower stall of Monsignor Faistl's apartment at the Villas at approximately

8:45 p.m. *Id.* Petitioner had come to Monsignor Faistl's window and asked that he let her in. Monsignor Faistl indicated that Petitioner was attempting to get him to leave the Villas. Ms. Hahn left before authorities could be called. *Testimony of Sister Lois Baniewitz offered during preliminary injunction hearing.*

On September 26, 2003, The Villas filed a complaint against Petitioner for trespass, and sought a temporary and preliminary injunction barring Petitioner from either entering the Villas, or from taking any action to remove Monsignor Faistl from the Villas. A Temporary Restraining Order to this effect was entered against Petitioner, and was extended by the Franklin County Common Pleas Court into a Preliminary Injunction following an evidentiary hearing on October 10, 2003. As part of that hearing, the Villas presented evidence that Monsignor Faistl did not want visits from Petitioner. *See Affidavit of Monsignor Faistl attached as Exhibit C to Respondents' Motion to Dismiss Petitioner's Appeal to the Tenth Appellate District Court; and Affidavit of Beverly L. Laubert attached as Exhibit D to Respondents' Motion to Dismiss Petitioner's Appeal to the Tenth Appellate District Court. A copy of the trial court's Order of Preliminary Injunction is attached to the Petition for Writ of Certiorari at Appendix E.*

On November 12, 2003, Petitioner filed a notice of appeal of the trial court's Order of Preliminary Injunction with the Ohio Tenth Appellate District. The basis asserted by Petitioner for jurisdiction was that the trial court's Order of Preliminary Injunction was "a 'final appealable order' as it . . . affects a substantial right made in a special proceeding." *See Petitioner's Docketing Statement and Petitioner's Motion To Dissolve, pp. 6-7, filed with Ohio Tenth Appellate District Court.* On November 26, 2004, the

Tenth Appellate District Court dismissed Petitioner's appeal for lack of a final appealable order. *A copy of that order is attached to the Petition for Writ of Certiorari at Appendix D.*

On December 24, 2003, Petitioner filed a Notice of Appeal to the Ohio Supreme Court. On April 28, 2004, The Ohio Supreme Court declined jurisdiction and dismissed the appeal as not involving any substantial constitutional question. *A copy of the Ohio Supreme Court's Entry dismissing the appeal was attached to the Petition for Writ of Certiorari at Appendix A.*

On or about January 11, 2004, Michael Hahn, the husband of Petitioner, removed Monsignor Faistl and his possessions from the Villas. *Petition for Writ of Certiorari, p.15.*

The underlying action is currently scheduled for a trial on the merits on October 4, 2004.

ARGUMENT

A. Petitioner's Petition For Writ of Certiorari Fails to Comply with Rules 14 and 29 of the Rules of The Supreme Court of The United States

In the Petition for Writ of Certiorari, Petitioner argues that "Ohio Revised Code 2505.02(A)(2) is unconstitutional and/or overbroad as it precludes appeal of a preliminary injunction which restrains First Amendment rights . . . ." *Petition for Writ of Certiorari, p. i, and 6.* Because the Petition challenges the constitutionality of a state statute, Petitioner was required to comply with Rules 14 and 29.4(c) of the Rules of The Supreme Court of The United States. The latter rule provides in pertinent part as follows:

> In any proceeding in this Court in which the constitutionality of any statute of a state is drawn into question, and neither the State nor any agency, officer, or employee thereof is a party, the initial document filed in this Court shall recite that 28 U.S.C. § 2403(b) may apply and shall be served on the Attorney General of that State.

Similarly, Rule 14.1(e)(v) requires that the Petition for Writ of Certiorari contain a concise statement showing that "the notifications required by Rule 29.4(b) or (c) have been made."

The Petition for Writ of Certiorari fails to comply with either Rule 14.1(e)(v) or Rule 29.4(c). The Petition draws into question the constitutionality of Ohio Revised Code § 2505.02(A)(2), yet fails to indicate that Petitioner has notified the Ohio Attorney General of the possible need to defend the state statute. The Petition for Writ of Certiorari is defective and must be returned to Petitioner as provided in Rule 14.5 of the Rules of The Supreme Court of The United States.

B. The Petition for Writ of Certiorari is Moot as The Trial Court's Order of Preliminary Injunction No Longer Affects Petitioner's Ability to "Associate" With Monsignor Faistl.

On October 14, 2003, the Franklin County Common Plea Court issued a preliminary injunction enjoining Petitioner from (1) entering upon the premises of the Villas, and (2) from taking any action to remove Monsignor Faistl from the Villas during the pendency of the action. *See Appendix E to Petition for Writ of Certiorari*. Petitioner appealed that order because it allegedly infringed upon her First Amendment

Right of Association. According to Petitioner, she had a constitutional right under the United States Constitution to associate with Monsignor Faistl which was being infringed by the trial court's preliminary injunction enjoining Petitioner from entering the Villas wherein Monsignor Faistl resided.

However, as revealed in the Petition for Writ of Certiorari, Monsignor Faistl is no longer living at the Villas, having left the Villas in January, 2004. *Petition for Writ of Certiorari, p. 15.* As such, the trial court's order no longer has any impact on Petitioner's ability to "associate" with Monsignor Faistl. Indeed, as further indicated in the Petition for Writ of Certiorari, Petitioner is now in fact "associating" with Monsignor Faistl, as Petitioner is allegedly assisting Monsignor Faistl with his priestly duties. *Petition for Writ of Certiorari, p. 17.*

Because all arguments raised in Petitioner's Petition for Writ of Certiorari related to Petitioner's alleged First Amendment Right to "associate" with Monsignor Faistl, and because the trial Court's preliminary injunction of October 14, 2004 no longer has any impact on Petitioner's ability to associate with Monsignor Faistl, Respondents respectfully submit that the Petition for Writ of Certiorari is moot, and should be denied.

C. The Trial Court's Order of Preliminary Injunction Enjoining Petitioner from Having Contact With Monsignor Faistl Did Not Infringe Upon Petitioner's First Amendment Right Of Association

In her Petition, Petitioner contends that she had a private religious association with Monsignor Faistl, and that the trial court's preliminary injunction infringed upon her First Amendment right of association. Petitioner's freedom of

association claim, however, was fundamentally flawed as it presupposes that there were two individuals who wanted to associate, herself and Monsignor Faistl. This was simply not the case. Monsignor Faistl stated in his own affidavit, and to representatives of the Office of the Ombudsman that he did not want to receive visits from Petitioner. *See Affidavit Of Monsignor Faistl and Affidavit of Beverly L. Laubert attached as Exhibits C and D to Respondents' Motion To Dismiss Petitioner's Appeal to the Ohio Tenth Appellate District Court, both of which were introduced as Exhibits during the preliminary injunction hearing.*

It is well-settled that no one can use claimed constitutional rights to invade the rights of others. *Champagne v. Clark*, 871 F. Supp. 1527 (D. Conn., 1994) (upholding anti-stalking law in face of challenge under First Amendment Freedom of Association challenge). As the United States Supreme Court has repeatedly held, expressive activity may be prohibited if it "involves substantial disorder or invasion of the rights of others." *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 513, 89 S.Ct. 733, 740 (1969). See also *Frisby v. Shultz*, 487 U.S. 474, 108 S.Ct. 2495 (1988)(abortion protesters' First Amendment rights may be restricted to protect residential privacy); *Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157 (1988)(protesters' First Amendment rights may be restricted to ensure proper functioning of foreign embassies); *Gravned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294 (1972)(right to protest ends where such protest disturbs proper functioning of a school). Simply put, Petitioner did not have a constitutional right to associate with Monsignor Faistl if Monsignor Faistl did not want to associate with her.

Indeed, consider the inane results that would occur if the First Amendment right of association was construed as

guarantying everyone an unrestricted right to meet with whomever they chose. If this were the case, there could be no anti-stalking laws, as a stalker would have a First Amendment right to meet with the subject of his or her unwanted attention. A trespasser would have a right to intrude upon anyone else's property if the trespasser wanted to "associate" with the property owner. A domestic violence offender could not be restrained from visiting the victim of his or her abuse, as it would infringe upon his or her First Amendment rights. Clearly, one person's First Amendment Right of Association does not eviscerate another person's right to be left alone.

Beyond the undisputed fact that Monsignor Faistl did not wish to meet with Petitioner, (*See Exhibits C and D to Respondents' Motion To Dismiss Petitioner's Appeal to the Ohio Tenth District Appellate Court*) the trial court's Order of Preliminary Injunction was also proper as the trial court correctly concluded that Petitioner's visits to Monsignor Faistl were having a disruptive effect at the Villas. Indeed, on more than one occasion, administrators at the Villas became aware that Petitioner was attempting to remove Monsignor Faistl from the Villas and move him into a private apartment against his wishes. In light of Monsignor Faistl's age and physical limitations, Petitioner's actions were a threat to Monsignor Faistl's well-being. Consequently, the trial court's Order of Preliminary Injunction did not violate Petitioner's First Amendment right of association. See *Gravned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294 (1972) (First amendment rights end when they begin to intrude upon the rights of others).

D. There Are No Compelling Reasons for the Supreme Court to Grant the Petition for Writ of Certiorari

As provided in Rule 12 of the Rules of the Supreme Court of the United States, a petition for writ of certiorari will be granted only for compelling reasons. While neither controlling nor fully measuring the Court's discretion, Rule 12 indicates the character of the reasons the Supreme Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Respondents respectfully submit that the questions raised by the Petition for Writ of Certiorari come no where close to the discretionary standard articulated in Rule 12 of the Rules of the Supreme Court of the United States. In the case below,

the Ohio Supreme Court did not decide any federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. Rather, the Ohio Supreme Court merely declined jurisdiction to hear Petitioner's appeal, as the Ohio Supreme Court concluded Petitioner's appeal did not involve "any substantial constitutional question."

Moreover, at no point did either the Ohio Supreme Court or the Ohio Tenth Appellate District Court rule that Ohio Revised Code Section 2505.02 precludes all appeals of preliminary injunctions, or requires that a preliminary injunction arise out of a "special proceeding," before it can be appealed as implied by Petitioner. Indeed, on its face, Ohio Revised Code Section 2505.02 provides otherwise. That is, Ohio Revised Code Section 2505.02(B)(4) sets forth specific conditions under which a preliminary injunction arising in a common law action constitutes a "final order" subject to appeal.

The fact is, however, that Petitioner never asserted Ohio Revised Code 2505.02(B)(4) as the basis for jurisdiction of her appeal, nor did she ever attempt to explain how the trial court's Order of Preliminary Injunction fit within the scope of this section justifying an immediate appeal. As the Tenth District Court of Appeals held:

> [Petitioner] has not demonstrated that an appeal from the trial court order granting appellee a preliminary injunction would not afford appellant a meaningful or effective remedy following final judgment by the trial court. Accordingly, appellant's November 14, 2003 motion to dissolve the preliminary injunction granted by the trial court is denied. Appellee's November 24, 2003 motion to dismiss is granted.

Ohio Revised Code Section 2505.02 clearly provides that an order of preliminary injunction may be immediately appealable under certain circumstances. Petitioner, however, never demonstrated that the trial court's order in the instant case fell within the scope of that statutory provision.

CONCLUSION

For the reasons set forth above, Respondents The Villas at St. Therese Assisted Living, Inc., Bishop James A. Griffin and the Diocese of Columbus respectfully request that Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

Roger P. Sugarman
Counsel of Record
Robert G. Schuler
Paul D. Ritter
R. Kevin Kerns
KEGLER, BROWN, HILL & RITTER
A Legal Professional Association
65 E. State Street, Suite 1800
Columbus, Ohio 43215
Telephone: 614-462-5400

Attorneys for Respondents
The Villas at St. Therese, Bishop James A. Griffin and Diocese of Columbus